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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND DURAN,

Defendant and Appellant.

F058228

(Super. Ct. No. VCF187715)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Melinda M. Reed, Judge.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez and Jennevee H. De Guzman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On July 23, 2007, appellant Raymond Duran fatally stabbed Antonio Stinson. Appellant testified that Stinson attacked him with a knife, they fought and he stabbed Stinson in self-defense.

Appellant was charged with premeditated murder. A lying-in-wait special circumstance and a weapon use enhancement were alleged. (Pen. Code, §§ 187, subd. (a); 190.2, subd. (a)(15); 12022, subd. (b)(1).)¹

After numerous continuances, trial was set for April 21, 2009.

On April 20, 2009, the parties appeared before Judge Melinda M. Reed for trial assignment. Defense counsel unsuccessfully requested a trial continuance. Then appellant requested substitution of counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), and self-representation pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). Both of these motions were heard and denied.

The case was assigned to Judge Paul A. Vortmann for trial, and he conducted the hearing on in limine motions that afternoon.

Jury selection began on April 21, 2009, and a jury was sworn on the next morning.

On April 29, 2009, the jury acquitted appellant of first degree murder but found him guilty of second degree murder and found the weapon use allegation to be true.

On May 28, 2009, appellant was sentenced to an indeterminate term of 15 years to life, plus one year.

Appellant contends that his federal constitutional self-representation right was infringed. We disagree and will affirm.

¹ Unless otherwise specified all statutory references are to the Penal Code.

FACTS²

On July 25, 2007, the initial complaint was filed. Appellant was arraigned and the public defender was appointed to represent him.

On August 6, 2007, appellant entered a not guilty plea. The preliminary hearing was set for September 17, 2007.

After two continuances, the preliminary hearing was held on January 7, 2008.

On January 22, 2008, appellant was arraigned on the original information. Trial was set for May 6, 2008.

Defense counsel filed a written motion to continue the trial. It was granted over the People's objection. Trial was reset for August 6, 2008.

On July 18, 2008, the People filed the amended information, which added the lying-in-wait special circumstance allegation. The trial date was vacated.

Defense counsel was granted a continuance to investigate the new allegation. Trial was reset for January 13, 2009.

On January 5, 2008, defense counsel filed a written motion to continue the trial because a new public defender had been assigned to the case. The motion was granted and trial was reset for April 21, 2009.

On April 14, 2009, defense counsel filed a written motion to continue the trial because he needed additional preparation time. It was heard and denied without prejudice during the pretrial hearing on April 15, 2009.

On Monday, April 20, 2009, the parties appeared before Judge Reed to be assigned to an open department for trial. During this appearance, defense counsel

² Since the only issue raised by appellant pertains to a pretrial procedural ruling, detailed recitation of the trial evidence is not necessary.

orally renewed his motion for a trial continuance. Following local protocol, Judge Reed heard and ruled on this motion.

Defense counsel stated he wanted a continuance because he had revised his trial strategy. During investigation of the case prior to the last continuance, the defense had discovered “several prior incidents of violence by the victim over in the Bay Area.” Defense counsel said he had not planned to introduce evidence about these acts because it would allow the prosecutor to introduce evidence of appellant’s prior violent acts. Defense counsel stated that when he made this tactical decision, he incorrectly thought appellant had been involved in a prior criminal incident that resulted in a juvenile adjudication for armed robbery. However, he recently realized that the incident resulted in a juvenile adjudication for a lesser offense. Therefore, defense counsel had decided to revise his trial strategy to include evidence of the victim’s prior violent acts. Defense counsel explained, “I’m not completely sure on my theory of allowing the victim’s prior acts in buffering my client’s acts, but I believe I do have a theory that would work to make it advantageous for me to call those witnesses at trial.” He requested a continuance sufficient to allow him to provide discovery and subpoena witnesses who would testify about the victim’s prior violent acts. Defense counsel acknowledged that he was given pertinent discovery about appellant’s criminal record in December 2008.

The prosecutor argued that if defense counsel presented evidence about the victim’s prior violence, he would have an opportunity to bring out the facts and circumstances of appellant’s prior violent crime, regardless of the actual adjudication offense. Therefore, defense counsel’s realization was not strategically significant.

The trial court found good cause for a continuance had not been shown and denied the motion.

Immediately thereafter, defense counsel stated, “Judge, we do have what I would like to describe as maybe a Marsden issue.”

Outside the presence of the prosecutor, the court asked appellant what he wanted to bring forward to the court. Appellant said he would like “to go pro per.”

The court attempted to ascertain whether appellant wanted a different attorney appointed or wanted to represent himself.

Defense counsel stated: “To clarify, it was brought to my attention that he didn’t want me to be his lawyer, necessarily, and wanted to discuss that possibility of pro per along with that.”

The court asked appellant if he wanted to represent himself or if he wanted a different attorney.

Appellant and defense counsel held a discussion off the record.

Then appellant said, “I want to request to remove my attorney from my case. I feel that we’re not ready to take it to trial. I feel that there’s more to be done. I really don’t feel comfortable with the investigation that he’s doing. I just don’t feel comfortable.”

Defense counsel stated that he had worked with appellant “this last couple weeks to bring him up to speed to be trial ready.” It appeared to defense counsel that appellant “doesn’t feel like he or the case is ready to go to trial.”

Defense counsel also stated that he was an experienced trial attorney and it was a “close call” whether additional investigation about the victim’s history for violence “would make a difference.” In all other respects, his investigation was complete and he was ready for trial.

The court asked appellant if he had any additional comments; appellant replied in the negative.

Then the court denied the *Marsden* motion.

The prosecutor returned to the courtroom. The court stated that it was handing the file to counsel to travel to department 7 for trial assignment.

Defense counsel said, “The pro per issue?”

The court asked appellant if he wanted to make a motion for self-representation and appellant replied affirmatively.

The court asked appellant to explain “exactly what it is that you wish to do at this point.” Appellant replied:

“I just -- I would like the opportunity to represent myself. I feel that there are certain things that I can do that would help me out in my case. I just -- I want to experience my case and do a little bit of investigation myself. And I just ask that I would like that opportunity to represent myself.”

The court ascertained from appellant and defense counsel that no prior *Faretta* motions had been brought in this case.

The court asked appellant if he was ready to move forward with the trial as scheduled and appellant replied that he was not ready.

The court set forth the case’s procedural history and it found that the quality of representation being provided by defense counsel was “more than sufficient.”

Then the court asked appellant if he wished “to make known why you are making this request to me now as opposed to in a more timely occasion.”

Appellant started to reply but defense counsel interrupted to “lay a little background that approximately three or four weeks ago his family was attempting to hire a private lawyer, and it never -- I tried to accelerate that process --”

The court stopped defense counsel and directed appellant to personally explain why he was “making this request to me now, as opposed to earlier?”

Appellant replied, “Okay. Like [defense counsel] was saying, my family a few weeks back was trying to hire a lawyer. I don’t know exactly if they’re going to be

able to do or when they're going to be able to do. [¶] I would like to go pro per until I can see --"

The court asked, "Are you just using this as a way to buy some time to see if your family can hire you a lawyer?"

Appellant replied, "No, ma'am. I -- I'm using this because I feel I would like to represent myself, like I told you."

Then the court ascertained from appellant that he only wanted to waive counsel if the court also continued the trial. If the court would not grant a continuance, appellant wanted to be represented by counsel.

The prosecutor argued the self-representation request was untimely.

Then defense counsel stated that he did not believe appellant was prepared to represent himself with the current trial date, "and that would not suit justice in any way at all. And barring that, I don't know that there's anything else really I could add other than the family has been trying, but the fire I tried to light under them didn't produce, because I was afraid of the same timetable problems."

The court stated, "Well, it is clear that defendant is not ready, well, and able to represent himself today at the motions in limine and at trial tomorrow."

The court ascertained from defense counsel that the *Faretta* request "also carries with it" a request to continue the trial.

Then the court denied the motion, as follows:

"And I do find that the request is not timely and not reasonable based on the eve of trial upon which the request is being made, the quality of representation afforded to the defendant previously, and the Court's finding that this request is sounding to be an opportunity to buy time so that the defendant can have his family perhaps obtain private counsel.

“And the Court is gravely concerned about the numerous delays that have previously occasioned in this case and for all of those reasons does find the request untimely and unreasonable and denies the request.”

DISCUSSION

Appellant’s constitutional self-representation right was not infringed.

Appellant argues his *Faretta* motion was timely and therefore the court was constitutionally obligated to grant it. Alternatively, he argues that if the *Faretta* motion was untimely, the lower court abused its discretion by denying it. Both of these arguments are unconvincing. As will be explained, the *Faretta* motion was untimely and denial of this motion was a reasonable exercise of judicial discretion.

“A defendant has a federal constitutional right to represent himself if he voluntarily and intelligently elects to do so. [Citation.]” (*People v. Burton* (1989) 48 Cal.3d 843, 852 (*Burton*).) This is not a self-executing right. “In order to invoke an unconditional right of self-representation, the defendant must assert the right ‘within a reasonable time prior to the commencement of trial.’ [Citations.]” (*Ibid.*) A trial court must grant an unequivocal and timely self-representation request that is also voluntary, knowing and intelligent. (*People v. Lynch* (2010) 50 Cal.4th 693, 721 (*Lynch*).) An untimely request “is addressed to the sound discretion of the trial court. [Citations.]” (*Burton, supra*, 48 Cal.3d at p. 852.)

“When a trial court exercises its discretion to deny a motion for self-representation on the grounds it is untimely, a reviewing court must give ‘considerable weight’ to the court’s exercise of discretion and must examine the total circumstances confronting the court when the decision is made. [Citation.]” (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398 (*Howze*).)

There is no bright-line test for determining the timeliness of a *Faretta* motion. (*People v. Clark* (1992) 3 Cal.4th 41, 99; *Lynch, supra*, 50 Cal.4th at p. 722.) Yet, our Supreme Court has provided substantial guidance on this topic.

In *Burton, supra*, 48 Cal.3d 843, our high court explained, “The ‘reasonable time’ requirement is intended to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.” (*Id.* at p. 852.) Thus, “‘a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request....’ [Citations.]” (*Ibid.*) When a self-representation request is made on “‘the day preceding trial,’” it “‘is addressed to the sound discretion of the trial court which should consider relevant factors such as whether or not defense counsel has himself indicated that he is not ready for trial and needs further time for preparation.’ [Citations.]” (*Id.* at pp. 852-853.)

In *Lynch*, which was decided during the pendency of this appeal, our Supreme Court provided an overview of state and federal cases on this topic and summarized the factors that should be conducted when assessing timeliness:

“[¶] As can be seen, the high court’s cases and those of this court guide us to the conclusion that a trial court may consider the totality of the circumstances in determining whether a defendant’s pretrial motion for self-representation is timely. Thus, a trial court properly considers not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation.” (*Lynch, supra*, 50 Cal.4th at p. 726.)

Examination of the totality of the circumstances in this case leads to the conclusion that appellant’s *Faretta* motion was untimely and denial of the motion was a proper exercise of judicial discretion.

“Where a defendant raises the motion on the eve of trial, the trial court has discretion to deny the motion. [Citation.]” (*Howze, supra*, 85 Cal.App.4th at p. 1397.)

Appellant's *Faretta* motion was made on the eve of trial. The case was ready to be assigned to a judge and for trial proceedings to commence.

Appellant did not offer any excuse or explanation for his delay in seeking to represent himself. The original complaint in this case was filed in August 2007. During the two years prior to the trial, appellant made many appearances before the court and not once did he express a desire to represent himself. Appellant knew for months that trial was scheduled for April 21, 2009. Yet, it was only when trial was imminent and defense counsel was unable to secure another continuance, that appellant suddenly expressed a desire to represent himself.

Numerous cases have found *Faretta* motions that were made in close proximity to the start of trial to be untimely and upheld their denial. (See, e.g., *People v Valdez* (2004) 32 Cal.4th 73, 102-103 [*Faretta* motion made immediately before commencement of jury selection untimely]; *People v. Clark* (1992) 3 Cal.4th 41, 99-100 [*Faretta* motion made while case was being trailed untimely]; *People v. Frierson* (1991) 53 Cal.3d 730, 742 [*Faretta* motion made on eve of trial untimely].)

A *Faretta* motion that was "made for purpose of delay" may properly be denied. (*Lynch, supra*, 50 Cal.4th at p. 722.) The record fully supports the lower court's conclusion that appellant's *Faretta* motion was a dilatory tactic. Appellant wanted to delay the trial until it could be ascertained if his family would retain private counsel for him. When the court asked appellant why he wanted to go pro. per., appellant replied, "Okay. Like [defense counsel] was saying, my family a few weeks back was trying to hire a lawyer. I don't know exactly if they're going to be able to do or when they're going to be able to do. [¶] I would like to go pro per until I can see --" Appellant's subsequent denial that the *Faretta* motion was a delaying tactic was not credible.

Appellant did not want to represent himself because he wanted to pursue a different trial strategy or develop a new line of defense. He just did not want to go to trial on April 21, 2009. Defense counsel had successfully obtained at least two trial continuances in the past. It was only after defense counsel was unable to obtain another continuance that appellant expressed dissatisfaction with his representation and made the *Marsden* and *Faretta* motions.

Further, appellant was facing an extremely serious charge: premeditated murder with a special circumstance allegation. The prosecutor and defense counsel were both prepared for trial. Witnesses were available. Trial had been postponed numerous times. This was a relatively complex case and further delay could have resulted in prejudice to the People and interfered with the orderly process of justice. These are all relevant factors. (*Lynch, supra*, 50 Cal.4th at pp. 726-728.)

Also, the trial court assessed the quality of defense counsel's representation and concluded it was more than adequate. Defense counsel was an experienced attorney who had tried numerous murder cases. During the hearing on the *Marsden* motion, defense counsel acknowledged that it was a "close call" whether additional investigation about the victim's history for violence "would make a difference." In all other respects, defense counsel was prepared for trial.

In contrast, appellant was completely unprepared for trial. He stated that he did not want to represent himself unless he was also granted a continuance. Appellant did not appear to have any idea how one would prepare a defense. If we were to accept appellant's statement that he actually wanted to act as his own attorney, there is no indication how long it would have taken him to investigate and prepare for trial. "A trial court may properly consider the delay inherently caused by such uncertainty in evaluating timeliness. [Citations.]" (*Lynch, supra*, 50 Cal.4th at p. 728.)

In light of all these circumstances, we conclude that appellant's *Faretta* motion was properly deemed untimely. Therefore, the lower court possessed discretion to deny it. We uphold its exercise of discretion for the following reasons: (1) appellant's only *Faretta* motion was made on the eve of trial; (2) the procedural history in this case was lengthy and appellant had numerous prior opportunities to seek self-representation; (3) appellant did not offer any justification for the delay; (4) the *Faretta* motion was a dilatory tactic intended to provide appellant's family with sufficient time to retain private counsel; (5) the murder charge and special circumstance allegation were extremely serious and could have resulted in life imprisonment; (6) the prosecutor and defense counsel were prepared to proceed to trial; and (8) the *Faretta* motion was contingent upon the grant of a trial continuance. For all these reasons, allowing appellant to proceed in propria persona was "reasonably likely to result in substantial delay and disruption of the proceedings." (*Lynch, supra*, 50 Cal.4th at p. 728.)

Appellant cites four cases which he contends this matter closely resembles: *People v. Elliott* (1977) 70 Cal.App.3d 984 [refusal to permit defendant to withdraw his waiver of counsel was abuse of discretion]; *People v. Cruz* (1978) 83 Cal.App.3d 308 [same & denial of continuance to prepare for trial was error]; *People v. Hill* (1983) 148 Cal.App.3d 744 [multiple errors where defendant vacillated between pro. per. & represented status]; and *People v. Nagaue* (1991) 229 Cal.App.3d 1115, 1126 [refusal to permit defendant to withdraw waiver of counsel for posttrial proceedings was abuse of discretion].) We agree with respondent that these cases are all factually distinguishable. In none of these cases did the defendant make his only *Faretta* motion on the eve of trial, after numerous continuances had been granted. Also, the defendants were not using a *Faretta* request as a dilatory tactic to enable private counsel to be retained.

Accordingly, we uphold the denial of appellant's *Faretta* motion and conclude that his constitutional self-representation right was not infringed.

DISPOSITION

The judgment is affirmed.

Levy, Acting P.J.

WE CONCUR:

Hill, J.

Poochigian, J.